United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6132

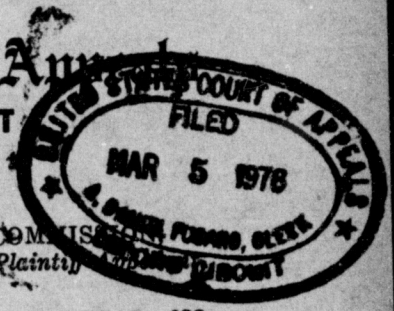
w/affidavit

To be argued by
STEVEN J. GLASSMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6132



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,
Defendants-Appellees.

GEORGE RIOS, et al.,
Plaintiffs-Appellants,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,
Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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BRIEF FOR PLAINTIFF-APPELLANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Preliminary Statement

This is an appeal from that portion of an order entered October 17, 1975 by the Honorable Dudley B. Bonsal, denying back pay to some members of plaintiff class of non-whites * following an earlier finding of

* The term non-whites has been used throughout the proceedings to refer to black and Spanish-surnamed workers (A. 618). Numbers in parentheses, unless otherwise indicated, refer to pages of the Appendix.

racial discrimination against those persons under Title VII, Civil Rights Act of 1964. Those earlier findings and other relief previously ordered by the District Court on June 21, 1973, and reported at 360 F. Supp. 979 (S.D.N.Y. 1973) have been the subject of previous review in this Court. See *Rios* v. *Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) and 520 F.2d 352 (2d Cir. 1975).

Issues Presented

1. Did the District Court err in applying different standards for back pay and injunctive relief, resulting in the denial of back pay to non-whites who had previously been found by the court to be the victims of racial discrimination?

2. Did the District Court err in retroactively applying a new federal statute of limitations to back pay claims?

3. Is it error for the District Court to consider the defendant union's financial resources as a defense to an award of back pay?

Statement of Facts

A. The Present Suit

The Government filed this action on June 29, 1971, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., to enjoin a pattern and practice of discrimination against non-whites in the construction industry (A. 107-117). Defendants are four local construction unions, and their counterpart joint apprenticeship committees and employer associations. Separate trials were ordered for each union.

In the case of Local 638, the Government's action was consolidated for the purposes of trial with a private class action against Local 638, the Joint Steamfitters Apprenticeship Committee of the Steamfitters Industry ("JAC") and the Mechanical Contractors Association of New York, Inc. ("MCA") (A. 15-63, 165).

B. Local 638 and the Steamfitting Industry

Local 638 is a labor organization having jurisdiction over steamfitting or pipefitting construction work in New York City and Long Island. The union has two branches: a construction branch whose members perform construction work on building sites ("A branch") and a metal trades branch whose members perform repair work in shops ("B branch"); A branch work pays higher wages than B branch work. *United States* v. *Local 638, Enterprise Assoc. Steamfitters*, *supra*, 360 F. Supp. at 984* (A. 586-88).

There were no non-white journeymen members of Local 638's A branch until 1967, and at the close of 1971, there were 3,850 A branch members of whom only 31 were non-white. 360 F. Supp. at 984 (A. 586-587); 501 F.2d at 627. Among white A branch members, nepotism has been a common practice, and members of the A branch still regularly request that their relatives be admitted to the A branch (Pl. Ex. 102).** At the time of trial, at least

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* It should be noted that most of the facts recited herein are taken from the District Court's findings of June 21, 1973, which findings were not appealed. Rather than repeat the caption of the case, that opinion will hereinafter be referred to as 360 F. Supp. at ..... References to a recitation of facts by the Court of Appeals will be referred to as 501 F.2d at ..... Additional references to the Appendix and Record have been made to emphasize details supporting the District Court's findings.

** Exhibits introduced at the trial below are included in the record on appeal and listed separately in the Index to the record by their designated exhibit number in the District Court.

11% of the A branch members were related to other A branch members, and it was quite common to find relatives working on the same job site. 360 F. Supp at 984 (A. 587-588, 217, 219-225).

Prior to the trial of this action, the union's admission procedures were informal and irregular in nature. New members were admitted when the leadership deemed it advisable, and there was no set time to review applications. In recent years, the committee which was supposed to screen applicants did not meet or discuss standards for the acceptance of new members to the A branch (A. 640-646). Although mandated by the union's constitution, new members had not been given a journeyman test for over ten years (A. 633, 699). While whites continued to be admitted to the A branch under these informal procedures, qualified non-whites were systematically excluded (A. 190-191, 201-204, 206-208, 514-521).

The union's admission procedures were designed to keep the union small, ensuring the existence of a shortage of A men. 360 F. Supp. at 986 (A. 591). This produced job security and an opportunity for A branch members to earn substantial overtime wages. 360 F. Supp. at 986 (A. 591). The employers have thereby been required to expend significant monies for overtime and to employ B men and non-union men (generally referred to as "permit men") as construction steamfitters. 360 F. Supp at 986 (A. 591). Joseph L. Hopkins, Secretary of MCA, testified that about 2,500 of the A men work most of the year (A. 310). Since 4,342 man-years were worked in 1971, the balance of the work was performed by the permit men (A. 311-312). This arrangement, whereby permit men are used to fill out the work force, had existed for at least the past ten years prior to the trial of this action (A. 313). Mr. Hopkins testified that although it would be reasonable to have a cushion of 200-400 permit men in the industry to take account of

periodic fluctuations, the number of permit men (1,200-1,600) was "unreasonable" (A. 314). He concluded:

> "As far as I am concerned, we are sitting here talking about 2,500 men taking home two-thirds of the money and what we need is some more numbers and some more color" (A. 315).

Local 638 does not run a hiring hall for construction steamfitters. Foremen and job superintendents, most of whom are white members or former members of the A branch, hire steamfitters as the need arises, 360 F. Supp. at 986 (A. 591-592) and recruit their friends and other workers they know (A. 720; Pl. Ex. 170G, p. 9; Pl. Ex. 170H, pp. 8-10; R. 8, prelim. inj.—71 Civ. 2877, Tr. 375).* Information concerning available employment is circulated informally, usually by word of mouth (A. 180-181). Being a member of the A branch, or at least a friend or relative of an A branch member, gives a worker access to the job availability information (A. 720) and is a substantial aid in obtaining a job as a construction steamfitter within Local 638's territorial jurisdiction. 360 F. Supp. at 984 (A. 588, 159); see 501 F.2d at 627. In this context, it is hardly surprising that a large number of relatives were working together at the various job sites (A. 221-225) and that many of the employed permit men were related to A branch members (A. 468). Indeed, many relatives of union members have worked for years as permit men (A. 469). Such opportunities for employment and training are simply not open to non-whites—they do not have the right "connections." (A. 227-29, 332-45).

Approximately 25% of the A branch members are graduates of an apprenticeship program provided by JAC. 360 F. Supp. at 987 (A. 593); 501 F.2d at 628.

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* Citations designated by the letter "R." refer to items in the Record on Appeal which were not included in the Appendix.

Apprentices are paid a percentage of journeyman's wages according to a schedule in the collective bargaining agreement. 360 F. Supp. at 986 (A. 592-93). Upon successful completion of the program, an apprentice becomes a full journeyman member of the A branch. 360 F. Supp. at 986 (A. 592). However, through the use of discriminatory admissions requirements, including written entrance tests which have excluded non-white applicants, this avenue to A branch membership has also been restricted largely to whites. 360 F. Supp. at 987 (A. 594-595). No non-whites became apprentices prior to 1964, 360 F. Supp. at 987 (A. 594), and until the trial of this matter, 492 apprentices have been indentured, of whom 94.3% were white. 360 F. Supp. at 988 (A. 596); 501 F.2d at 628. At the time of trial, there were 376 participants in the JAC's apprenticeship program of whom only 16 were non-white. *Id.*

C. The Preliminary Injunctions

After commencement of the private action in 1971, the steamfitting contractors, through MCA, made an effort to recruit and hire some non-white steamfitters for their construction jobs (A. 70-71). With the assistance of the Workers Defense League, a minority placement organization, more than a hundred non-whites were employed during 1971 (A. 160-161). In the Fall of 1971, fearing that many of these non-whites would be laid off due to the unwritten industry practice that permit men are hired last and laid off first (R. 9, strike hearing—71 Civ. 2877, Tr. 8-9; R. 38; strike hearing—71 Civ. 2877, Tr. 98-99), the Government moved for a preliminary injunction requiring Local 638 to admit as full journeyman members of its A branch those non-whites who were then working satisfactorily as construction steamfitters within the union's territorial jurisdiction. After a 3-day hearing, Judge Bonsal granted the Government's motion.

On January 3, 1972, Judge Bonsal issued his Findings, Conclusions and Order (A. 142-164). He found that there were 169 non-whites who were then performing A branch work in the territorial jurisdiction of Local 638. Many had applied for A branch membership, but were either ignored or misled (A. 162). The District Court found that Local 638 had discriminated in the past against non-whites, that its failure to admit these 169 non-whites constituted unlawful discrimination (A. 162) and it ordered Local 638 to immediately admit them to the A branch (A. 142-156). No appeal was taken from this decision, which is reported at 337 F. Supp. 217 (S.D.N.Y. 1972).

Giving life and point to the Government's contentions in support of its preliminary injunction motion, and while the motion was still *sub judice*, the union went on strike to protest the actions of an employer who had dared to lay off white members of the A branch ahead of two non-white permit men.* The District Court temporarily restrained the strike as violative of Title VII and a hearing was held (R. 9, strike hearing—71 Civ. 2877, Tr. 21-23). Following Judge Bonsal's admonition after the hearing, the men returned to work (R. 10, strike hearing—71 Civ. 2877, Tr. 227-231).

Judge Bonsal was not the first federal judge to conclude that Local 638 had violated Title VII. Earlier, the individual plaintiffs also obtained a preliminary injunction when District Judge Frankel, after a hearing, found that the union had followed a course of racial discrimination over the years which had, in particular, resulted in the exclusion of three of the individual plaintiffs from A branch membership (A. 79-95). Accordingly, he

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* Mindful of the pending lawsuit, the employer in question had laid off an equal percentage of white A men and non-white permit men (all of the union men on the site were white; all of the permit men were non-white) as part of a general reduction of the work force as the building neared completion (R. 9, strike hearing—71 Civ. 2877, Tr. 4-5).

ordered Local 638 to admit them as full journeyman members (A. 105-106), a decision which was also not appealed. That decision is reported at 326 F. Supp. 198 (S.D.N.Y. 1971).

D. The District Court's Opinion Following Trial

The consolidated trial of this action commenced on January 15, 1973 and concluded on January 26, 1973. On June 21, 1973, Judge Bonsal issued his opinion, containing both his findings of fact and conclusions of law (A. 580-622).

In his decision, Judge Bonsal found that since the issuance of his preliminary injunction, Local 638 continued its past discriminatory journeyman admissions policy. 360 F. Supp. at 989 (A. 598-599); 501 F.2d at 625. While no non-whites were admitted in 1972 other than as a result of the aforesaid preliminary injunction, 156 whites were admitted by informal standards similar to those held to be discriminatory at the preliminary injunction hearings. 360 F. Supp. at 989 (A. 599). Another 32 whites were admitted upon their graduation from the apprenticeship program. 360 F. Supp. at 989 (A. 599). Even after the preliminary relief, only 4.5% of the A branch members were non-white, as contrasted with the much larger proportion of blacks and Spanish-surnamed persons in the population of New York City and Long Island. 360 F. Supp. at 989 (A. 599-600).

In addition to making broad findings of discrimination in journeyman admissions, Judge Bonsal found extensive discrimination in work referrals and in the apprenticeship program. 360 F. Supp. at 990-92; 501 F.2d at 625.

With respect to work referral, the District Court found that there had been a general industry practice to main-

tain steady crews of men, who are shifted from job site to job site as construction needs change. When additional men are needed, the hiring is done by foremen and job superintendents, most of whom are white present or former members of Local 638's A branch. 360 F. Supp. at 990 (A. 601-602). Steamfitters learn of job openings by contacting A branch members, and occasionally they seek the aid of Local 638's business agents or officers. The Court concluded that this informal, word-of-mouth hiring pattern, combined with the union's history of racial discrimination, continued to give whites advantages in obtaining work as construction steamfitters and thereby perpetuated the effects of past racial discrimination. 360 F. Supp. at 990 (A. 603). As a result, the Court stated that industry referral practices had to be modified.

The District Court also held that various criteria used by JAC to select apprentices, particularly the written tests, discriminated against non-whites. Since 1967 for example, 41% of the white applicants passed the entrance exams, while only 10% of the black and 11% of the Spanish-surnamed applicants were successful. 360 F. Supp. at 987 (A. 594). The JAC failed to prove that these aptitude tests were job related and had been properly validated for the steamfitting industry. 360 F. Supp. at 991-92 (A. 607). As a result of such discriminatory selection devices, the vast majority of apprentices who were indentured after 1964 were white. 360 F. Supp. at 998 (A. 596). Naturally, this situation assisted in preventing non-whites from becoming members of the A branch.

E. The Order and Judgment Following Trial

On June 21, 1973, the District Court issued the Order and Judgment (A. 566-579),* which enjoined defendants

* The Order and Judgment is unofficially reported at 6 EPD ¶ 8716 (S.D.N.Y. 1973).

from discriminating against individuals on the basis of race, color or national origin (A. 566-568), provided that affirmative action proposals designed to reach a goal of 30% non-white union membership by July 1, 1977 should be submitted within three months to an Administrator appointed therein, after which a program was to be promulgated by the District Court (A. 569-572), established certain temporary procedures for the admission of non-white workers into the union and the apprenticeship program (A. 572-576) and rendered certain general relief concerning industry work referral practices (A. 576-578). The issues of back pay, costs and attorneys fees were reserved for later determination (A. 578-579). The District Court retained jurisdiction over the action to ensure compliance with the Order and Judgment and to enter such additional orders as might be necessary (A. 579).

No appeal was taken with respect to the appointment of the Administrator or the definition of his powers and duties, nor was any appeal taken with respect to the general injunctive provisions or those affecting industry work referral practices.*

F. Prior Appeals

No appeals were taken by defendants from either Judge Frankel's Preliminary Injunction in the private

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* On March 29, 1974, an Affirmative Action Plan was adopted by the District Court to implement the terms of its June 21, 1973 Order. It contained interim goals designed to achieve a 30% non-white A branch membership by July 1977, through a combination of direct journeymen admissions, apprenticeship program and other trainee programs. That program continues in operation, with the Administrator and ultimately the Court available to resolve disputes concerning admissions, apprentice training and work referral, as well as to ensure progress toward achievement of the racial goal designed to eradicate the effects of past discrimination.

plaintiffs' case in March 1971 or Judge Bonsal's Preliminary Injunction in the Government's case in January 1972. As is noted in this Court's opinion reported at 501 F.2d 622, 627, no appeal was taken from any of the District Court's findings of discrimination. The principal attack was on the propriety of the 30% goal set by the District Court.* This Court, while upholding the validity of the remedial racial goal, remanded for a more precise determination of the figure based on the available labor force for this industry.**

G. The Back Pay Opinion and Order

In its June 21, 1973 Order and Judgment, Judge Bonsal specifically reserved decision on the issue of back pay (A. 576-78).

In a memorandum opinion dated June 27, 1975, and now reported at 400 F. Supp. 988, the district court stated that "back pay will be awarded to qualified members of the plaintiff class who applied in writing for membership in the A Branch and who were discriminatorily denied admission after October 15, 1968." 400 F. Supp. at 991 (A. 770). Notwithstanding the extensive prior findings of discrimination, the court thus rejected back pay for the large majority of the victims of discrimination, described by the district court as:

> (1) non-white A branch members who, though qualified, were denied jobs as a result of the discriminatory work referral practices fostered by

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* The second appeal in this case involved the denial of post-judgment intervention by whites who claimed a right to A-Branch admission under the Order. The Court of Appeals affirmed the district court. *Rios et al. and Gunther* v. *Enterprise Assoc. Steamfitters Local 638*, 520 F.2d 352 (2d Cir. 1975).

** On remand, the goal was set at 26%. *Rios* v. *Enterprise Assoc. Steamfitters Local 638*, 400 F. Supp. 983 (S.D.N.Y. 1975).

> defendants; (2) non-white members of the B Branch who were not admitted to the A Branch; (3) other persons qualified to be A Branch members who were either denied membership in the A Branch or were discouraged from applying for membership or from seeking employment in the steamfitting industry; (4) persons who, with on-the-job training, were capable of learning the skills necessary to be a journeyman steamfitter; and (5) unskilled persons who were denied admission to the apprenticeship program, or who, once admitted, dropped out, or who were deterred from applying to the apprenticeship program because of defendants' discriminatory policies and tests. 400 F. Supp. at 990 (A. 770).

The Court gave its reasons for denying back pay to more individuals as follows:

> "Back pay for others for whom it is sought will be denied since (1) damages, if any, arising from alleged discriminatory work referral practices are not ascertainable since Local 638 had no hiring hall and there are no accurate records of job openings for the period involved; (2) damages to persons who did not make formal written application to the A Branch are hypothetical; and (3) damages suffered as a result of the apprenticeship program are speculative, and equitable considerations weigh against making these back pay awards since the admission tests used by defendants were registered with the United States and New York State Departments of Labor and were adopted by defendants in good faith on the recommendation of experts." 400 F. Supp. at 991 (A. 770-71).

In the Order which was signed on October 9, 1975 and entered October 17, 1975 (A. 777-80), the period of

back pay was to be limited to the period beginning October 15, 1968, or 2 years prior to the filing of a complaint with the EEOC, and terminating on June 21, 1973, the date of the court's permanent injunction (A. 779). Further, the Court specifically reserved the right, after determination of all claims, to make a *pro rata* reduction of each claimant's award or provide payments in installments, based on the financial resources of the Union (A. 779-80).

Plaintiffs appealed from the denial of back pay, and the Union cross-appealed. The Union moved to dismiss the plaintiffs' appeals as premature, and plaintiffs moved for permission to seek *nunc pro tunc* certification of the back pay order from the district court. On February 10, 1976, the Court of Appeals (Timbers, Lumbard, *C.J.J.*, Van Pelt Bryan, *D.J.*) granted the plaintiffs' motion and allowing application to the district court for certification, while retaining jurisdiction of the action for all purposes.

On February 23, 1976, Judge Bonsal granted plaintiffs' motion for certification pursuant to 28 U.S.C. § 1292(b), in the following terms:

> Following a hearing on February 10, 1976 in the Court of Appeals, plaintiffs move *nunc pro tunc* for certification pursuant to Fed. R. Civ. P. 54(b) or pursuant to 28 U.S.C. § 1292(b) of this Court's order signed on October 9, 1975 awarding back pay to certain members of the plaintiff classes. The Court is of the opinion that the order involves controlling questions of law as to which there is substantial ground for difference of opinion, including the appropriate grounds for the denial of back pay, whether "good faith" or lack of funds are defenses to claims for back pay, and whether testimonial evidence is necessary in making an award of back pay. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). More-

over, an immediate appeal will materially advance the ultimate termination of the litigation since a final ruling as to which categories of the plaintiff class members are entitled to back pay is necessary to an economical and expeditious determination of the recipients' identities and the total amount of the defendant Union's liability.

Accordingly, plaintiffs' motion for certification pursuant to 28 U.S.C. § 1292(b) is granted.

It is so ordered.

ARGUMENT

POINT I

The standards set by the District Court for the award of back pay are improper and should be reversed.

(a) Back Pay Should Not Be Contingent on the Existence of a Written Application for Direct Admission to the Union.

In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the Supreme Court has recently reaffirmed the fundamental role played by back pay awards in the "legislative design" of Title VII which is "directed at an historic evil of national proportions." 422 U.S. at 416. Given the Congressional policy of granting the most complete relief possible to remedy the vestiges of racial discrimination, the Supreme Court went on to limit the discretion of a District Court to deny back pay.

> "It follows that given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradi-

> cating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* 422 U.S. at 421.

The District Court's action here, in restricting its award of back pay to those who "applied in writing for membership in Local 638's A Branch", conflicts with the standards of *Albemarle* and imposes an unrealistic burden of proof on affected qualified non-whites who were the victims of the Union's discriminatory admission practices.* *EEOC* v. *Local 638 . . . Local 28*, — F.2d —, Docket No. 75-6079 (2d Cir. March 8, 1976).

The testimony, both at the preliminary injunction hearings and at the trial on the merits, revealed numerous instances of qualified non-white individuals who were told not to bother applying or who were given a run-around or *actively* discouraged because of the Union's policies and actions.** By so sharply limiting the class

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* The District Court's limited award also explicitly or implicitly excluded whole classes of non-whites including those who were discriminatorily denied work referrals, those who were discriminatorily denied entrance to the apprentice program, and those who were discouraged from applying by the union's reputation. These denials are also contrary to *Albemarle*, and are treated more fully in Point I(b) and (c), *infra*.

** Thus, for example, on October 20, 1972 Orlando Charon was told not to apply by the receptionist (A. 188-89). On December 1 he wrote to the Union requesting an application but never received any response (A. 848, A. 514). Selywn Arbuckle wrote several letters in 1972, but received no response. He was told at meetings that his letters had been forwarded to Washington (A. 190-91). Rafael Roger wrote several letters and only got a response a few weeks before the trial, advising him that his application would be placed on file for future reference (A. 201-02). Joseph Lopez and Erwin Leito told similar stories (A. 203-08). This merely repeated the experience of non-whites prior to the January 3, 1972 Preliminary Injunction. (See Prelim Inj. -71 Civ. 2877-Tr. 102, 130-1, 141-2, 218-21, 270-71, 302-3, Govt Ex. 10,

[Footnote continued on following page]

of eligible non-whites, the District Court is in effect rewarding Local 638 and JAC for the very practices which inhibited and discouraged non-whites from making written applications. Such a reward in this case surely "frustrates" the "central statutory purposes" of Title VII.

Further proof of the effect of these practices on non-whites is the finding by the District Court that almost *all* admissions of non-whites to the A Branch, rather than being through the formal application process, had been court ordered through the 1971 and 1972 preliminary injunctions (164 non-white admissions). 360 F. Supp. at 989; 501 F.2d at 628. Indeed, as the District Court noted in issuing its January 1972 Preliminary Injunction, the application process was designed to keep the Union from being flooded by keeping the total A Branch membership low (A. 159).

Further, the EEOC strenuously disputes the District Court's statement that "damages to persons who did not make formal written application to the A Branch are hypothetical." Certainly by this conclusory statement, the District Court has failed to "carefully articulate its reasons" for denying back pay as required by *Albemarle*, 422 U.S. at 421, n. 14. Surely, the chance existence of a written application cannot be dispositive of whether an injury has, in fact, occurred. *EEOC* v. *Local 638 . . . Local 28, supra.* If injury has been suffered, the lack of a written application cannot somehow render such injury "hypothetical," nor should it automatically deny affected non-whites their statutory right to be made whole. Thus, in *Hairston* v. *McLean Trucking Co.*, 520

12, 13). In fact, there was never any set time to review any applications that were filed (See Prelim Inj. -71 Civ. 2877-Tr. 487), the Committee did not meet to screen applicants (*id.*) and until recently there was a sponsor requirement (Prelim Inj. -71 Civ. 2877-Tr. 36). Some men did not apply at all because they were told by older men that it was a waste of time (A. 126-27, 136).

F.2d 226 (4th Cir. 1975), the Court considered whether a non-white should automatically be denied backpay in a Title VII case if he had not actually requested a transfer or promotion to a higher paying position. Although the lack of such a request was "relevant," the Court noted that "clearly, it is not dispositive," and permitted such individuals to go forward with pack pay claims. 520 F.2d at 231.

Moreover, it is submitted that the alternative—testimony by non-whites who have experienced the manifold variants of Local 638's and JAC's discrimination—is *completely* acceptable. Testimonial evidence, whether or not corroborated by documentary evidence, is an integral part of all litigation. Indeed, it was *crucial* in proving the underlying case of discrimination which is the predicate for both the injunctive and equitable relief originally ordered by the District Court after trial. There is no reason why it should be excluded in these back pay proceedings. By doing so, the District Court has in effect adopted different standards for granting injunctive and back pay relief in a Title VII case. The Supreme Court in *Albemarle* explicitly rejected any such double standard:

> "There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies." 422 U.S. at 423. (Footnote omitted.)

It is respectfully submitted that the District Court's double standard here was an abuse of discretion.

(b) Back pay to the victims of discrimination is neither unascertainable nor speculative

Given extensive findings of discrimination in the apprentice program and in work referrals, and the attend-

ant effect on non-whites, the District Court's conclusion that damages from these forms of discrimination are "too highly speculative" or "unascertainable" to even permit members of the affected classes to present specific evidence of individual discrimination is erroneous.

The existing record already contains some of the evidence of specific injury to individuals, such as those who failed apprentice entrance exams*; back pay hearings would naturally supplement this record. The same is true of those who were discriminatorily denied work referrals—both before and after they were finally admitted to the A Branch.**

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*As noted at p. 9, *supra*, 41% of the white applicants passed the entrance exams, while only 10% of the black and 11% of the Spanish-surnamed applicants were successful. (A. 594). All of those who failed the exams are readily identifiable. Many of the non-whites who failed the discriminatory entrance test still desire to enter the apprentice program (Ex. 157, p. 12). Jewel Steel and Paul Bailey, both of whom failed the written test and were not accepted into the program, testified that they are presently earning considerably lower wages and still wish to become steamfitters (A. 861-63; Tr. 694-5, 699-700). Some men were told they were over age, and thus did not formally apply (A. 853).

**Although it does not maintain a formal hiring hall, the union president, Mr. Murray, testified that when the union learns of a new job, it contacts the steamfitting subcontractor and tries to put its members on the job. See 501 F.2d at 627. The union has also undertaken to provide workers in response to calls from the MCA and specific employers. (Gov't Ex. 18, pp. 44-46; Prelim Inj. -71 Civ. 2877-Tr. 151, 163, 181, 184, 193, 202, 458). The District Court earlier found that the union has referred B-men to work in its jurisdiction (A. 160). The existence of "permit" men has been a practice for at least the past 10 years prior to trial. (A. 312-15). There are many relatives of A-men working on various jobs who are "permit" men (A. 468). Many sons of Union members work for years as "permit" men (A. 469).

[Footnote continued on following page]

In *United States* v. *United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975), the Fifth Circuit reversed a decision of the District Court which, after finding a pattern and practice of discrimination, did not afford certain classes of non-whites an opportunity "one-by-one, to present personal claims for backpay." (*Id.* at 1053). In remanding the case to the District Court, the Fifth Circuit gave explicit instructions that the members of the class of non-whites against whom the defendants had discriminated were "presumptively entitled" to an opportunity to prove individual damages. Noting that a "bifurcated approach" is proper in a Title VII case, the District Court directed that in "Stage I" the plaintiffs "must demonstrate a *prima facie* case of employment discrimination." Once this case is established then the class of non-whites is "presumptively entitled to move into Stage II with the presentation of individual backpay claims." *Id.* at 1053-55. *Accord*, *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

It cannot be doubted that in this case the plaintiffs have already demonstrated much more than a "*prima facie*" case of violations of Title VII with respect to the

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Non-whites, however, were denied such referrals or received premature layoffs (A. 227-29, 332-45).

Even when they become members of the A branch, non-whites cannot expect equal job opportunities. Thus, it took George Rios six weeks to find a job after a strike ended. (A. 227-30). Cedric Miller, Roy Brown and Winston Bailey, all of whom are certified welders (A. 330, A. 341; Tr. 1186 were laid off; the only A-men laid off from the job which was far from completion were four non-whites (A. 334-35). Indeed Miller's partner, a white A-man, was retained (A. 332; Tr. 1178). Miller and Brown went to the union hall, left their phone numbers with John Sheeran, the union vice president, but never received a call (A. 337-38). A recent study by the Court-appointed Administrator also showed that while non-white journeymen now comprise 22% of the work force, they only have 11% of the work. (A. 1207-08).

apprentice program admission procedures and Local 638's use of discriminatory work referrals. Those discriminated against in the apprentice program can be identified. See p. 18, n., *supra*. The differences between wages they received and were entitled to is also easily ascertainable. See 360 F. Supp. at 986 (A. 592-93; A. 861-62). The District Court has nonetheless prohibited affected non-whites from moving into "Stage II". Clearly that action by the District Court frustrates a "central statutory purpose" of Title VII and must therefore be reversed. *Albemarle Paper Co.* v. *Moody, supra; United States* v. *United States Steel Corp., supra; EEOC* v. *Local 638 . . . Local 28, supra.*

The District Court's further rationale that the alleged "speculative" or "unascertainable" degree of damages should eliminate from back pay eligibility whole classes of non-whites has been soundly rejected by the Fourth Circuit's decision in *Hairston* v. *McLean Trucking Co., supra*:

> "[We] reject the notion that an employer who has practiced racial discrimination in employment may avoid redressing the wrong inflicted on the ground that the resulting injury is not capable of precise measurement. . . . Title VII condemns subtle as well as gross discrimination, and our duty to redress all forms of discrimination is clear. Like a jury's determination of compensation for pain and suffering in a suit for personal injuries, 'unrealistic exactitude is not required' in back pay determinations; and because of the nature of the case, 'uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer.' *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380, n. 53 (5th Cir. 1974). See also *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974)." 520 F.2d at 232-33.

By its decision here, the District Court is in effect requiring non-whites to show damages with "unrealistic exactitude" and is *automatically* resolving "uncertainties" as to damages *against* those non-whites who have experienced the discrimination and *in favor* of Local 638 and JAC. Such a result can hardly be justified under the mandate of Title VII and *Albemarle*.

It is imperative that the District Court's decision setting standards for the award of back pay be reversed and that this Court permit individuals in all classes of non-whites to present their evidence of back pay damages to the fact finder. In so doing, the JAC also, of course, should be held liable, where appropriate, for damages caused to non-whites denied admission to the apprentice program.

(c) Good faith is not a defense to a back pay award

In denying back pay to those who were discriminatorily denied admission to the apprentice program, the District Court also based its decision on the apparent good faith adoption of discriminatory admission tests by the union and JAC. 400 F. Supp. at 991 (A. 770-71).

The law is clear that good faith is *not* a defense in a Title VII case, and that such a defense is equally inapplicable to claims for back pay as well as other relief. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 422-23; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982; *Sledge* v. *J. P. Stevens & Co.*, — F. Supp. —, 10 E.P.D. ¶ 10,585, at p. 6439 (E.D.N.C. 1975).

The District Court's denial of back pay to non-white apprentice applicants because of a good faith defense must therefore be reversed.

POINT II

Back pay should be awarded for all claims which arose or continued within three years prior to the filing of administrative charges.

In these combined actions, the Government filed suit on June 29, 1971 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Private plaintiffs filed suit on February 26, 1971 under Title VII, and also under 42 U.S.C. §§ 1981 and 1983, following a charge filed with the EEOC on October 15, 1970, and an earlier charge filed with the New York Division of Human Rights on August 19, 1970.

Prior to 1972, and when these actions were brought, there was no specific applicable federal statute of limitations for civil rights actions. However, in Section 706(g) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(g), Congress subsequently enacted a statute of limitations of 2 years prior to the filing of a charge with the EEOC.

The District Court here, while recognizing that the federal statute of limitations had not been enacted when these lawsuits were filed, nevertheless decided to retroactively apply the 1972 statute. It did so by reasoning that "this amendment has a bearing on Congressional intent as to the limitation to be imposed in granting back pay awards and will be applied." 400 F. Supp. at 992 (A. 774). The District Court thus made its limited award of back pay applicable to the period beginning on the date discrimination occurred or October 15, 1968 (two years prior to the filing of a complaint with the EEOC by private plaintiffs), whichever is later. *Id.*

We respectfully submit that the District Court's retroactive application of the statute of limitations enacted

in 1972 was erroneous. Such subsequent enactment cannot be held to be binding or reflective of prior Congressional intent, and must be disregarded. See *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975); *United States* v. *Georgia Power Co.*, 474 F.2d 906, 922, n. 21 (5th Cir. 1973); *Sledge* v. *J. P. Stevens & Co.*, *supra*.

When there is a federal right without a specific federal statute of limitations, it is well established that the courts must look to the analogous state statute of limitations. *Chevron Oil Co.* v. *Hudson*, 404 U.S. 97, 104 (1971); *Jones* v. *Trans World Airlines*, 495 F.2d 790, 799 (2d Cir. 1974); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 405 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co., Inc.*, *supra*, 494 F.2d at 258; *Johnson* v. *Goodyear Tire & Rubber Co.*, *supra*, 491 F.2d at 1378; *United States* v. *Georgia Power Co.*, 474 F.2d 906, 922-24 (5th Cir. 1973); *Macklin* v. *Spector Freight Systems*, 478 F.2d 979, 994 (D.C. Cir. 1973); *Swan* v. *Board of Education*, 319 F.2d 56, 59 (2d Cir. 1963) (Marshal, *J.*). The above cases deal with the general proposition cited above, as well as specifically with civil rights actions and, in *Pettway*, *Johnson* and *Georgia Power*, with back pay awards as well.

The analogous New York statute of limitations is C.P.L.R. § 214(2), which established a 3 year limit for "an action to recover upon a liability . . . created or imposed by statute . . .". The Second Circuit has repeatedly applied this provision in the context of federal civil rights actions. *DeMatteis* v. *Eastman Kodak*, 511 F.2d 306, 312, n. 8 (2d Cir. 1975); *Thomas Kaiser* v. *Cahn*, 510 F.2d 282, 285 (2d Cir. 1974); *Ortiz* v. *La Valle*, 442 F.2d 912 (2d Cir. 1971); *Romer* v. *Leary*, 425 F.2d 186 (2d Cir. 1970); *Swan* v. *Board of Education*, *supra*.

The three-year statute of limitations does not end the matter. Thus, where a charge has been filed with the EEOC prior to the institution of suit, that EEOC charge tolls the statute of limitations. *Franks* v. *Bowman, supra*, 495 F.2d at 405; *Pettway* v. *American Cast Iron Pipe Co., Inc., supra*, 491 F.2d at 258; *Johnson* v. *Goodyear Tire & Rubber Co., supra*, 491 F.2d at 1378. In *United States* v. *Georgia Power Co., supra*, a Title VII action brought by the Attorney General, the Court stated:

> ". . . the policy of Title VII requires that the filing of a complaint with the EEOC based on the identical patterns or practices of discrimination upon which suit is subsequently brought, operates to toll the statute of limitations as to all potential claimants who rely upon the same act of discrimination as the basis for their right." *Id.*, 474 F.2d at 925.

The same policy dictates a further tolling of the statute of limitations for other efforts by non-whites which put the defendants on notice of a potential lawsuit, including the filing of a charge with the State Division of Human Rights, prior to the filing of the EEOC charge. See *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Hutchings* v. *U. S. Industries*, 428 F.2d 303, 308-09 (5th Cir. 1970); *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891-93 (5th Cir. 1970).

Further, where as here there has been continuing discrimination rather than isolated acts, so long as the discrimination continued into the three-year period prior to the filing of the charge or complaint, recovery may be had for the *entire period* during which the discrimination occurred. *Macklin* v. *Spector Freight Systems, supra*, 478 F.2d at 995, n. 30; *United States* v. *Georgia Power Co., supra*, 474 F.2d at 924; *Harper* v. *Mayor and City Council of Baltimore*, 359 F. Supp. 1187,

1195-96 (D.C. Md. 1973), *aff'd sub. nom, Harper* v. *Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Commonwealth of Pa.* v. *Glickman*, 7 E.P.D. ¶ 9125, at pp. 6723-24 (W.D. Pa. 1974); see also *Donaldson* v. *O'Connor*, 493 F.2d 507, 529 (5th Cir. 1974).

Back pay is therefore appropriate for anyone who can demonstrate * that he was the victim of discrimination on or after August 19, 1967 (at any time within 3 years prior to August 19, 1970, the filing of the first charge with the New York Division of Human Rights). The period of collection however, in cases of continuing discrimination, would run from the first date on which he could demonstrate discrimination, even prior to August 19, 1967, or from July 2, 1965 (the effective date of Title VII), whichever is later. *Pettway* v. *American Cast Iron Pipe Co., Inc., supra*, 494 F.2d at 258.

Further, we note that the District Court ordered that damages for back pay extend until the date the person was admitted to journeymen status in the A Branch, or June 21, 1973 (the date of the court's Order and Judgment), *whichever is earlier.* We respectfully submit that the June 21, 1973 termination date, too, is erroneous. *Patterson* v. *American Tobacco Co.*, — F.2d — Docket No. 75-1259, slip op. at 23-25 (4th Cir. Feb. 24, 1976).

The purpose of back pay is, of course, to make whole the victims of discrimination. *Albemarle Paper Co.* v. *Moody, supra.* The fact that the District Court on June 21, 1973 ordered an end to future discrimination should have no bearing on the termination date for a back pay award. The injunctive and other equitable provisions

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* Continuing discrimination could be evidenced, *inter alia*, by new overt acts or by testimony that the individual did not reapply because he thought it would be fruitless or because of the discriminatory reputation of the defendant.

of the June 21, 1973 order did not provide for immediate entry into the A Branch for all identifiable victims of past discrimination, nor for immediate job placement of journeymen or apprentices or apprentice applicants who had previously been denied admission to the union, the apprentice program, or equal job referrals. The June 21, 1973 Order instead provided for the future administration of entrance tests and for admission goals (based on a combination of journeymen, apprentices and other trainees) to be met by July 1, 1977. If the union wanted to fully remedy the effects of past discrimination by admitting all identifiable victims immediately, or at least more quickly, it could. *Cf*, *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417-18. But it should be chargeable with back pay damages for identifiable victims of past discrimination until the time it actually remedies the discrimination, rather than simply until the date the District Court ordered that it begin the process. *Patterson* v. *American Tobacco Co.*, *supra*, at pp. 24-25. To hold otherwise is to encourage the union to delay the remedial process as long as possible rather than to encourage the rapid achievement of the victims' rightful place.

POINT III

Lack of funds is not a defense to back pay claims.

Noting that financial data submitted by Local 638 "indicates that it has limited financial resources", 400 F. Supp. at 992 (A. 772), the District Court stated that it would ultimately review the aggregate liability for back pay awards and its impact on the Union's financial resources, and reserved the right to make a *pro rata* reduction of each claimant's award or provide for payments in installments, 400 F. Supp. at 993 (A. 775, 779-80).

While the financial resources of a defendant are of course relevant to the collectability of a judgment—and may result in an agreement among the parties as to the ultimate amount, form and timing of actual payment—we submit that it would be error to allow the District Court discretion to make such a reduction or accommodation, or indeed to hear testimony or other evidence on the matter.

The general rule is that the admission of evidence concerning the financial resources of a party constitutes error unless wealth is necessarily involved in determining damages sustained. *Blankenship* v. *Rowntree*, 219 F.2d 597, 598 (10th Cir. 1955); see *Eisenhauer* v. *Burger*, 431 F.2d 833, 837 (6th Cir. 1970). In most jurisdictions, such evidence is admissible only for purposes of assessing punitive damages. *Seifert* v. *Solem*, 387 F.2d 925, 929 (7th Cir. 1967); *Parkins* v. *Brown*, 241 F.2d 367, 368 n.2 (5th Cir. 1957); 25 C.J.S. Damages § 126(2), (3) (1966). In New York, the rule is that financial resources are not to be considered for either compensatory damages or punitive damages. *Stewart* v. *Mutual Clothing Co.*, 91 N.Y.S. 2d 338 (Monroe Co. Ct. 1949); *Wilson* v. *Onondaga Radio Broadcasting Corp.*, 23 N.Y.S. 2d 654 (S. Ct. Onondaga Co. 1940).

Given the policy of ensuring that the victims of racial discrimination are made whole, *Albemarle Paper Co.* v. *Moody*, *supra*, it is especially important that financial resources not influence a court's back pay award. In *Russell* v. *American Tobacco Co.*, — F.2d —, 10 E.P.D. ¶ 10,412, at 5831 (4th Cir. 1975), the court specifically rejected a union's attempt to avoid back pay—and indeed to shift its burden to a more solvent employer—on the grounds of its own "meager assets." In addition to the settled rules relating to evidence, public policy dictates that financial resources not be considered by the District Court. *See also*, *Rhem* v. *Malcolm*, 507 F.2d 333, 340-42

(2d Cir. 1974); *Goss* v. *Bd. of Education*, 482 F.2d 1044, 1046 (6th Cir. 1973) (*en banc*), *cert. denied*, 414 U.S. 1171 (1974).

CONCLUSION

For all of the foregoing reasons, the District Court's limitations and denials of back pay should be reversed with directions to enter an order against both Local 638 and JAC in accordance with the opinion of this Court.

Dated: New York, New York,
March 9, 1976

Respectfully submitted,

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